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No. 82-708

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

SUMMA CORPORATION,

Petitioner,

vs.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

CITY OF LOS ANGELES OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

The court below, the California Supreme Court, was presented with the issue of whether title to a parcel of land, derived from a Mexican land grant, was subject to an easement of "commerce, navigation and fishing" ("public trust easement"). The parcel is water covered, subject to the tides of the Pacific Ocean, and covered with sea water at both low tide and high tide. The California Supreme Court has in several recent cases held that water-covered lands are subject to a "trust interest" notwithstanding that title to such land is in private ownership.

The court held that Mexican rancho land was subject to the same public trust easement interest as were other similar lands. Respondent, City of Los Angeles, therefore, does not agree with petitioner's descriptions of the questions presented to this court.

In our view they are:

1. Is a federal question presented by a determination that lands derived from a Mexican land grant are subject to the same public trust easement as other similiar lands in the State of California? Petitioner asserts that federal jurisdiction arises under the Treaty of Guadalupe Hildago (9 Stat. 922) (1848) and the "Act of 1851" (9 Stat. 631).

2. If a federal question is presented, did the patent to such land under the "Act of 1851" terminate all public rights and easements in such land which existed when it was under Mexican sovereignty?

3. Is a statement of fact in a Land Commissioner opinion "res judicata" as to the character of the patented lands, or, as respondents contend, is determination of the character of the land beyond the commissioners' jurisdiction and of no effect?

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Respondent, City of Los Angeles respectfully submits that a writ of certiorari is not appropriate in this case. The reasons therefore are explained hereafter.

OPINIONS BELOW

The petitioner has accurately set forth the opinions of the California Court of Appeal and the California Supreme Court and has reproduced those opinions in the appendix to its petition.

JURISDICTION

While respondent does not agree that this is a matter properly within this court's jurisdiction, it has no quarrel with the manner in which the jurisdictional claim is made.

STATUTE INVOLVED

Petitioner has designated and set forth in its appendix the appropriate federal statutes involved in this case.

STATEMENT OF CASE

A. Facts.

The facts of this case are appropriately stated in various portions of the opinion of the California Supreme Court in City of Los Angeles v. Venice Peninsula Properties, et al. (1982) 31 Cal. 3d 288, 182 Cal. Rptr. 599, 66 P. 2d 92, reproduced in page A-1 - A-32 of

the appendix to the petition.[1/]

"In the present case, the issue is whether the public trust doctrine applies to tidelands in which the state and federal government never had fee title. The tidelands involved here were originally acquired by private persons from the Mexican government prior to the time California was ceded to the United States under the Treaty of Guadalupe Hidalgo, and later patented to the owners by the federal government in accordance with requirements of the treaty." (p. A-2.)

"In 1839, while California was a part of Mexico, the Constitutional Governor of California granted to

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1/ References herein will be made to the appendix to the petitioner's petition of writ of certiorari and to various pages thereof. We will also throughout this opposition refer to other portions of said appendix.

Augustin and Ignacio Machado and Filipe and Tomas Talamantes a property known as Rancho Ballona. The rancho's western border was the Pacific Ocean and it included Lots C and R. [These are lots contained in a subdivision made in 1905 of a portion of the rancho.] . . . .

* * *

"The Machados and Talamantes, following the procedure set forth in the act [Act of 1851], petitioned the Board of Land Commissioners in 1852 for a decree confirming their title to the rancho. After a hearing the board confirmed the title, describing the boundaries of the rancho in the same terms as the original Mexican grant. That decision was affirmed by the United States District Court in 1855.

"However, before a patent could issue, a survey of the property was required, approved by the Surveyor General of California. (9 Stat. 633, §

13.) In 1858, Henry Hancock conducted a survey and prepared a plat which showed a large body of water labeled 'inner bay' extending from the southwest corner of the property parallel to the Pacific Ocean in a northwesterly direction. Hancock's field notes set forth his measurements as he walked along the shores of the bay, crossed an inlet, and came to the Pacific Ocean." (pp. A-4 - A-5.)

"In 1869, objections to the survey were filed by the owners of the ranch which bordered Rancho Ballona on the north, an area some distance from that marked 'inner bay' on the Hancock survey. Under a statute passed in 1864 to expedite the settlement of land titles in California (13 Stat. 332) the Hancock survey was forwarded to Washington to the General Land Office Commissioner, who was required to approve it prior to the issuance of the

patent, and to settle conflicting claims to the land surveyed. Commissioner Willis Drummond decided that the survey was accurate with regard to the disputed northern boundary. He determined also that the 'inner bay' shown on Hancock's map was not an arm of the sea, basing this determination in part on three affidavits which stated that the area labeled 'inner bay' on the plat was dry land used for pasturage, except at times of overflow at high water and during storms, when sand blocked the mouth of the creek which, on Hancock's plat, emptied into the 'inner bay'. However, Drummond approved the Hancock survey." (pp. A-5 - A-6.)

"Ballona Lagoon, the subject of this proceeding, is an arm of the Pacific Ocean in the Marina del Rey area of Los Angeles. It is subject to the tides, and inundated with seawater at mean low tide and mean high tide. At

mean high tide, the depth of the water is sufficient to be navigable by shallow draft vehicles [vessels]. At its northern end, the lagoon is connected to the Venice Canals, and provides the sole source of water for them. (p. A-2.)

"In 1905, the shore surrounding the lagoon was subdivided into three large abutting tracts, and some of the tidelands were filled and improved. The present case involves two of those tracts, Lot R of the Silver Strand subdivision and a portion of Lot C of the Del Rey subdivision, both of which consist entirely of waterways. . . . In recent years, motor-controlled tide gates were installed between the Pacific Ocean and the entrance to the lagoon to control the ebb and flow of the tide within the lagoon; they are used to prevent flooding of the adjacent land." (p. A-2.)

B. **Proceedings Below.**

We believe the California Supreme Court has also concisely and accurately described the nature of the proceedings involved herein, the parties, and the trial court judgment. We therefore quote from the decision as follows:

"The City of Los Angeles desired to dredge the lagoon, construct sea walls, and make other improvements therein without exercising its power of eminent domain. It filed an action for declaratory relief and to quite title in the lagoon against the owners of lots C and R, and the holder of an easement in these lots (hereinafter called defendants). The complaint alleged that the public owns an easement in the lagoon for commerce, navigation and fishing, for the passage of fresh water to the Venice Canals, and for water recreation. It alleged also that the

lots had been dedicated by their owners for public use. The city joined the State of California as a defendant in the action, as contemplated by section 6308 of the Public Resources Code. The state thereafter filed a cross-complaint, alleging that it had acquired an interest in the tidelands of the lagoon for commerce, navigation and fishing upon admission to the Union, that it held this interest in trust on behalf of the public, and had granted its interest to the city. (For literary convenience, the city and the state will be referred to collectively as plaintiffs.)" (pp. A-2 - A-3.)

"After a trial at which both documentary and testimonial evidence was received, the trial court determined that the state holds in trust for the people the easements claimed in the city's complaint, and that the state or its successors have the right to

construct the improvements in the lagoon without exercising the power of eminent domain. The court found also that defendants had dedicated the property as public streets or waterways." (p. A-4.)

C. Mexican Law.

At page 13, petitioner in its footnote 13 implies that the California Supreme Court was in error in determining that tidelands were inalienable under Mexican law, citing a decision involving Spanish law and its application within the Phillipine Islands. (Jover y Costas v. Phillipine Islands (1911) 221 U. S. 623.) Under California law the existence of foreign law and its meaning is a question of fact, but subject to judicial notice by the trial court if it chooses to take

such notice. 2/ In the case at bar, the trial court required testimony on the law of Mexico. The findings of the trial court are summarized in the following quotation from the California Supreme Court opinion.

"The law of Mexico at the time of cession declared that the public had a right to use of the tidelands; this right was similar to the common law public trust. In the grant of Rancho Ballona to the Machados and Talamantes, it was provided that the grantee 'may

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2/ California Evidence Code Section 452 provides, in part: "Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451: . . . (f) The law of an organization of nations and of foreign nations and public entities in foreign nations." Rule 44.1 of the Federal Rules of Civil Procedure also provides for "judicial notice" permitting the court to "consider any relevant material or source, including testimony." However, under Rule 44.1, the determination of foreign law is a question of law.

enclose it without predjudice to the traversing roads and servitudes.' An expert on the law of Mexico who testified on behalf of defendants [petitioner herein] stated that the purpose of this language was to preserve 'the rights of the public. . . [omission by court] in the conveyance of large tracts of land by the authorites.' Thus, when California was ceded by Mexico, the title of defendants' predecessors was subject to the interests of the public in the tidelands included in the grant." (pp. A-8 - A-9.)

We submit that the trial court and the California Supreme Court have correctly determined the applicable Mexican law. The decision in Jover is not applicable to the case at bar. Jover concerned a grant by the Phillipine governor of tidelands, and only tidelands, with an express provision that such tidelands be

reclaimed, not reserving public rights as in this grant. A substantial portion of the granted tidelands had been reclaimed while the Phillipine Islands were a possession of Spain. This is not comparable to a grant of a large tract of land of which only a portion were tidelands, and which were not reclaimed.

Thus, the decision of the trial court and of the California Supreme Court did not result in any diminution of the private rights of the Mexican grantees or their successors from those which they had when Ballona Rancho was under the sovereignty of Mexico.

D. Applicability of Decision.

The California Supreme Court decision applies only to water covered land. At pages 10 through 12 of its brief, petitioner implies that filled and/or reclaimed lands are affected by the decision. However, the impact of

the California Supreme Court opinion is only to establish that tidelands (sloughs, creeks and shallow pools) shall be treated the same throughout California, whether located in Mexican land grant properties or in other properties. The California Supreme Court expressly declined to make its opinion applicable to any properties other than those in issue and similar properties. It stated in footnote 15: "Our opinion is not to be understood as deciding matters which are raised by the parties but are not necessary to the determination of the issue before us. For example, although the state alleged in its cross-complaint that portions of the Ballona Lagoon which have been filled are still subject to the public trust, that issue is not involved in the present proceeding, since the property here consists entirely of tidelands." (p. A-16.)

If assertions are made in the future that filled and/or reclaimed lands are subject to the trust, the nature of the public's rights in such lands, if any, is an issue for subsequent litigations.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. Summary of Argument.

Petitioner asserts the decision of the Supreme Court of the State of California is "unprecedented." It is subject to being so described only because it is the first time there has been a litigation in which a tidelands easement has been claimed in property patented under the Act of 1851. Otherwise, it is fully in accord with established precedent.

As the California Supreme Court states (p A-1), in California a trust interest exists in tidelands and in lands between high and low water in

nontidal waters. This Court has also found that such interest exists in water covered land where title is derived from a royal patent from the King of England. (Lewis Blue Point Oyster Cultivation Company v. Briggs (1913) 229 U. S. 82.) It has found that such interest exists, and cannot be abdicated, in waters of Lake Michigan which had been conveyed by the Illinois legislature. (Illinois Central Railroad Company v. Illinois (1892) 146 U. S. 387.) It would appear that lands derived from a Mexican land grant should be treated no differently than lands generally.

The writ which petitioner seeks should not be granted for the following reasons:

1. The cases discussing the effect of a patent under the Act of 1851 were not concerned with the existence or non-existence of easements. Most of the

cases cited dealt with who or what entity held title to lands which were subject to the tides, but which had been reclaimed and were no longer suitable for tidelands purposes except United States v. Coronado Beach Company (1921) 255 U.S. 472 (see infra p. 20). The issues were which of the parties had the right to make a general use of the properties involved, not whether such uses were restricted to commerce, navigation and fishing.

2. This Court has squarely held that the Act of 1851 had no application to the existence or nonexistence of easements. The determination of whether or not land is encumbered with easements is not a federal question.

3. This Court has squarely held that granted tidelands, including those derived from grant or patent from a previous sovereign, could be and were

subject to the sovereign navigation easement.

4. The jurisdiction conferred upon the General Land Office was to determine boundaries of the granted land. This is all that was at issue when Commissioner Drummond made his report of April 30, 1873. The recitations in the Drummond report are contradictory to the conclusion in the report, but regardless of their nature, were surplusage to the issue presented and the limited jurisdiction of the office.

B. The Cases cited by Petitioner involve Title.

It is true, as petitioner asserts, that "this Court has consistently held that tidelands contained within prior Mexican grants did not pass to California on its admission to the Union." These rulings, however concerned title - not subsidiary

interests in land. While each case contains language describing the effect of the grant as having the effect of a "quitclaim," the cases did not involve public rights in the granted lands. The cases determined which of two parties had a right to make a "non-sovereign" use of the land.

The cases cited by petitioner do not involve any claims of easements, sovereign or otherwise, in tidelands.

United States v. Coronado Beach Company (1921) 255 U. S. 472 was a condemnation case. The United States claimed it should not have been required to pay compensation when it sought to acquire title in certain submerged lands. The district court and this Court disagreed. It held title had been established in the confirmation proceedings, stating at pages 487-488: "The questions whether there was such a prior grant, and what were its

boundaries, were questions that had to be decided in the proceedings for confirmation, and there was jurisdiction to decide them as well if the decision was wrong as if it was right." [Emphasis added] The case says nothing about whether the title in such submerged lands is subject to encumbrances or restrictions. 3/

Knight v. United Land Association (1891) 142 U. S. 161 involved two parties claiming title to lands which were once, but were then no longer, below the line of ordinary high

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3/ The United States may use tidelands for navigation purposes and take over exclusive possession of them without payment of compensation under its navigation servitude. But if the United States choses to condemn the fee it must pay just compensation. (United States v. 11.48 acres (5th C, 1954) 212 F.2d 853, 855; United States v. 93.97 acres (7th C, 1958) 258 F. 2d 17, 26.)

water. Thomas Knight, the defendant, claimed a right to use the land for private purposes based on conveyances from the Mexican land grantee, the City of San Francisco. United Land Association claimed from the State's Tidelands Commissioner. Neither party claimed the right to utilize property for tidelands purposes or claimed that the land was subject to a tidelands restriction.[4]/

4/ This fact was expressly recognized In Crystal Springs L. & W. Co. v. City of Los Angeles (1897) 82 F. 114, 119, affirmed 177 U. S. 169. The district court said "Knight v. Association, 142 U. S. 161-216, . . . was also clearly a suit of federal cognizance, because the contest was between titles derived, one through a grant from the State of California, and the other through a patent issued by the government of the United States . . . ." In the view of the district court, a water rights dispute in patented land (under the Act of 1851) did not present a question under either the Treaty of Guadalupe Hidalgo or the Act of 1851. (See infra, p.28.)

San Francisco v. Le Roy (1891) 138 U. S. 656 was a quiet title action where the plaintiff claimed title from both the City and the State Tideland Commissioner to land which was no longer subject to tides nor useful for tidelands purposes.

The same is true in Beard v. Federy (1866) 70 U. S. 478. There Mr. Beard, who had never had his title confirmed by the Lands Commission, asserted that the confirmed title was invalid because of being improperly issued by the Mexican governor. Again, two private persons were contesting the ownership of land to be used for private purposes. None of the cases involved a claim to the soverign easement or right of commerce, navigation and fishing.

All of the cited cases must be read and construed in the light of the issues presented, which were never the right of the public to use tidelands.

Such caution is contained in the very important navigation case of Illinois Central Railroad Co. v. Illinois (1892) 146 U. S. 387, 453, where this court stated:

> "General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases."

Contrary to petitioner's assertion, the cited cases are not "controlling precedent." At most, they contain dictum read out of context.

C. This Court has Repeatedly Stated that the Existence or Non-Existence of Easements in Property Derived from a Mexican Land Grant is not a Federal Question.

The Act of 1851 conferred only limited jurisdiction in Mexican land grant matters. Jurisdiction was (1) "to

decide upon the validity of the said claim" (§8, pp. A-109 - A-110), and (2) "to cause all private claims which shall be finally confirmed to be accurately surveyed." (§13, p. A-112) No additional matters were to be decided, and in all other respects the patented land was to be treated as land generally.

The single most important authority on such limitation is this Court's 1855 decision that it would not involve itself in the question of the existence of servitudes in lands granted by the Spanish or Mexican governments in California; nor in whether such servitudes survived the confirmation process. This case was Fremont v. United States (1855) 58 U. S. (17 How.) 542. The District Court had held that Colonel Fremont was not entitled to confirmation of his claim under a Mexican grant because the land contained

gold and silver. Under Spanish and Mexican law precious minerals were not subject to private ownership. Of this argument this Court said at page 565:

> "In relation to that part of the argument which disputes his right, upon the ground that his grant embraces mines of gold or silver, it is sufficient to say, that under the mining laws of Spain, the discovery of a mine of gold or silver did not destroy the title of the individual to the land granted. The only question before the court is the validity of the title. And whether there be any mines on this land, and if there be any, what are the rights of sovereignity in them, are questions which must be decided in another form of proceeding, and are not subjected to the jurisdiction of the commissioners or the court by the Act of 1851." [Emphasis added.]

This ruling has been followed in subsequent decisions of this Court in which a party sought to have the federal courts determine the existence or nonexistence of easements in lands

patented under the Act of 1851. It was so well settled that federal jurisdiction did not exist that this Court summarily affirmed the dismissal of a suit commenced in the United States District Court seeking to litigate the existence or nonexistence of a servitude. (Crystal Spring L. & W. Co. v. City of Los Angeles (S.D., Calif., 1897) 82 F. 114; affirmed in Crystal Springs L. & W. Co. v. City of Los Angeles (1900) 177 U.S. 169.) In that case, the District Court said in dismissing the complaint (p. 117):

> "Where the parties claim under Spanish or Mexican grants, confirmed and patented by the United States, and the controversy is only as to what were the rights acquired by the parties respectively, or their predecessors in interest, under the Spanish or Mexican governments, it being conceded that the rights so acquired, whatever they may have been, were included in the confirmation and quitclaimed through the patent of the

United States, federal jurisdiction does not exist; and it is immaterial whether such rights were acquired through the original grants or transactions subsequent thereto." [Emphasis added.]

See also Devine v. City of Los Angeles (1906) 202 U.S. 313, 337.

Petitioner asserts that the "Equal Footing Doctrine" 5/ does not apply to this case. That doctrine properly refers to "political rights and to sovereignty." (United States v. Texas (1950) 339 U. S. 707.) To the extent it deals with property rights in navigable waters, it applies only to the shores and "the soils under them." (Ibid.)

5/ This term has not been utilized in this litigation until the petition for writ of certiorari. Respondent has not sought to rely upon such doctrine. Petitioner has sought to thrust upon respondent a theory that is inapplicable and which respondent has not used.

D. The Rights Obtained by a Private Grantee in Navigable Waters are Subject to the Sovereign Easement of Commerce, Navigation and Fishing.

Petitioner's basic theory is that the confirmation of the patent under the Act of 1851, without reservation of public easements or rights, conclusively establishes their non-existence. Petitioner so argued to the courts below. The California Supreme Court held that the confirmation did not destroy the public trust easement.

The California Supreme Court, at this time or at the time patent confirmations were being litigated, could not have held otherwise. If it had done so, the public roadways connecting the ranchos and the urban areas of the state would have legally ceased to exist. This did not occur, and both communication and

transportation continued to exist in California. It would not be rational to preserve land highways and not similarly treat the waterways which were, and are, a major highway of commerce.[6/] The highway easements which survived the patent under the Act of 1851 are every bit as broad as the public trust easement, permitting, under California Law, nearly every pub'ic use. (Mancino v. Santa Clara, etc. Flood Control District (1969) 272 Cal. App. 2d 678, 77 Cal. Rptr. 679.)

It is unlikely that any litigation will arise at this time questioning the existence or non-existence of a highway easement which

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6/ This court has indicated that road easements survived the patent. (Barker v. Harvey (1901) 181 U. S. 481, 499.) Such rulings are rare, however, because this court generally held that existence of servitudes did not present a federal question.

may have existed prior to 1848. 134 years have gone by, and long continued public use will have conclusively established the existence of such highway. Similarly, the public has been making navigation uses of the waters which are the subject of this litigation; the trial court ruled that there has been an implied (or prescriptive) dedication of easements for use as waterways. (pp. A-16 and A-32.)

Whenever the need or opportunity to do so has occurred, this Court has held that the navigation easements survived a grant of submerged lands.

A most important example of this ruling is Illinois Central R. Company v. State of Illinois (1892) 146 U. S. 387. This Court affirmed a ruling that a grant by the Illinois legislature of the submerged lands of Lake Michigan

adjacent to the City of Chicago was invalid insofar as it purported to grant the fee of such lands for purposes other than the futherance of navigation and commerce.[7/] The Court pointed out that the state's title in tidelands is different from that held by the state in lands it intends to sell. "It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private

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7/ This Court's consideration of the Illinois Central case does not conflict with our argument that the quality of title and/or restrictions upon title do not involve a question of federal law. Illinois Central was considered by the United States District Court on the theory that the repeal of legislation granting such land presented a question relating to impairment of the obligation of contract or deprival of property without due process of law. (State of Illinois v. Illinois Central R. Company (N.D. Ill., 1883) 16 F. 881.)

parties." (P. 452.) Of such title, this Court said: "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, . . .than it can abdicate its police powers in the administration of government and the preservation of the peace." (p. 453.) And the Court concluded at page 455 that an act of the Legislature conveying such lands "would be repudiated without hesitation, as a gross perversion of the trust over the property under which it is held."

With respect to grants made by previous sovereigns, the case of Lewis Blue Point Oyster Cultivation Company v. Briggs (1913) 229 U. S. 82 appears much in point. Plaintiff's title derived from a grant made to a portion of the bed of the Hudson River when New York was a part of Great Britain. The

defendant was a contractor of the United States employed to dredge a channel in the river. The dredging would destroy a plaintiff's oyster bed.

This Court held that plaintiff was not entitled to an injunction to restrain the dredging, stating as pages 87 and 88:

> "That case and the later one cited fail to recognize the qualified nature of the title which a private owner may have in the lands lying under navigable waters. If the public right of navigation is the dominant right, and if, as must be the case, the title of the owner of the bed of navigable waters holds subject absolutely to the public right of navigation, this dominant right must include the right to use the bed of the water for every purpose which is in aid of navigation. This right to control, improve, and regulate the navigation of such waters is one of the greatest of the powers delegated to the United States by the power to regulate commerce. . . .
> "By necessary implication from the dominant right of navigation, title to such submerged land is acquired and

> held subject to the power of Congress to deepen the water over such lands, or to use them for any structure which the interest of navigation, in its judgment, may require."

This policy was more recently reiterated in Montana v. United States (1981) 450 U. S. 544, 552, where the Court said that there is a presumption against conveyance of the bed of a navigable water and a court "must not infer such a conveyance;" that "the mere fact the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, ..." (ibid at p. 554); and, finally, this Court explained that all parties agreed that a navigational easement was owned by the United States "regardless of who owns the riverbed." (Ibid at p. 555.)

Petitioner, at pages 13 and 14, asserts that the State had to present its claim during the confirmatory

process under the Act of 1851. It bases its argument on this Court's decisions in Barker v. Harvey (1901) 181 U. S. 481 (supra) and United States v. Title Insurance Company (1924) 265 U. S. 472. Those were cases in which the court held that tribes of Indians had lost their right to occupancy of patented lands, if they ever had such right, by failing to present the claim. A positive holding that servitudes survive the patent process, even though not claimed by the dominant owner under the Act of 1851, is in Devine v. City of Los Angeles (1906) 202 U. S. 313, 316 where this Court recited, but rejected the argument:

> "And the bill further averred that the construction of the act of Congress of March 3, 1851, upon which the defendant city rested its right and claim to said river and to said waters, is erroneous, and. . . the city was required to present to the board of land commissioners its claim to the waters of the river for confirmation."

In the Devine case, at page 337, this Court said questions as to "nature and extent of. . .title. . .are not Federal questions but questions of State or general law." It also affirmed that a person or entity claiming an easement in granted land need not file a claim. This was in accord with Fremont v. United States (1855) 58 U. S. (17 How.) 542 (supra) where the court stated: "The only question before the court is the validity of the title."

It therefore is established that the public rights in navigable waters will survive a Mexican land patent, and that the easement rights did not have to be claimed in the confirmation proceeding.

E. Commissioner Drummond's Comment Regarding the Character of the "Inner Bay" was Superfluous to the Determination of the Boundaries of

Rancho Ballona and, Considering all the Circumstances, was Ambigious.

The Act of 1851 clearly established and limited the jurisdiction of the Land Commissioners. Their jurisdiction and duty was "to decide upon the validity of the said claim." (pp. A-109 - A-110.) Thereafter, it was the duty of the Surveyor-General of California "to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same." (p. A-112.) Thereafter, a patent issued to the claimant upon presentation of a certificate of confirmation and a certified plat or survey. (p. A-112.) It is clear that the validity of the title and the location of the boundaries were all that was decided in the confirmation proceedings.

None of the cases cited by petitioner at page 17 of its petition

are to the contrary; in fact, they support the determination of the California Supreme Court. For example, in Borax Consolidated Ltd. v. City of Los Angeles (1935) 296 U. S.10, 17 this Court said of the rule relating to finality of General Land Office decisions: "But this rule proceeds upon the assumption that the matter determined is within the jurisdiction of the Land Department," and continued and pointed out that the jurisdiction of the department is a matter for judicial determination. (p. 18.)

Each of the other cases also involved title. None of them involved the rights of the public in such land. Further, Burke v. Southern Pac. R. Company (1914) 234 U. S. 669, 710 expressly recognized the right of the government to sue to annul a patent issued without authority. A similar qualification was contained in Johnson

v. Drew (1898) 171 U. S. 93, 100.

A determination of whether or not the so called "inner bay" was an arm of the sea, covered by water, or pasture land was entirely outside of the jurisdiction of the Board of Land Commissioners and the Surveyor-General. It was also, in context, merely a comment on the evidence. The character of that area was not determinative of the disputed boundaries of the rancho. This Court has held that non-essential determinations--determinations which do not substantially affect the rights of the parties--do not have a res judicata or collateral estoppel effect, stating in Norton v. Larney (1924) 266 U. S. 511, 517: "The principle of res judicata does not apply to points which come under consideration only collaterally or incidentially." To the same effect, see Lynne Carol Fashions Inc. v. Cranston Etc. Co. (3d C 1972) 453 F.2d 1177, 1183

where the court said: "The requirement that the issue to be barred must have been necessary to the decision in the first litigation is well entrenched in the law. The sound basis for the principle is that parties should be estopped only on issues they actually deem important, and not on incidental matters."[8/]

Petitioner claims at page 11 of its brief that this case "does affect the hundreds of sloughs, creeks and shallow pools lying inland from the shoreline, often separated from the oceans by a barrier beach, sand spit or other land mass." The fact that such "wetland areas" were commonly included

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8/ It should be noted that this limitation applies to courts of general jurisdiction. Where the jurisdiction is limited, as with the Surveyor-General, even essential findings beyond the limited jurisdiction should not have a res judicata effect.

in Mexican grants, and commonly included within the confirmed boundaries, certainly establishes that their existence was not a matter of great concern to the Surveyor-General.

The California Supreme Court also points out the ambiguity of the Surveyor-General's decision. On one hand he said it was not "an arm of the sea." On the other hand he approved the Hancock survey and his field notes which showed the existence of the "inner bay". (p. A-6.) An additional ambiguity exists because Commissioner Drummond's determination did not negate that the inner bay was water covered. In fact the depositions of Tomas Talamantes, Jose Del C. Sepulveda and Ignacio Machado, mentioned by Commissioner Drummond, reflect that the inner bay was covered by waters, and was a lake. (See California Supreme Court opinion at page A-6.) The public trust

easement exists in inland waters as well as tidal waters. (See page A-1 and State of California v. Superior Court (Lyon) (1981) 29 Cal. 3d 210, 172 Cal. Rptr. 696.)

Finally, it should be noted that Commissioner Drummond's decision is dated April 30, 1873. This was 23 years after California became a state and a sovereign. While the determination as to the boundary of the Ballona Rancho certainly "related back," we submit that determinations beyond the jurisdiction of the Surveyor-General could not "relate back." The State of California was not a party to the boundary proceedings. Thus it would appear that neither res judicata nor collateral estoppel could apply as to the nature of the "inner bay."

CONCLUSION

It is respectfully submitted that this Court held in 1855 that the questions raised by the petition for writ of certiorari are not federal questions. It has reaffirmed that holding several times since then. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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